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CONFLICTING POLICIES: SPECIAL EDUCATION AND HIGH STAKES TESTING IN THE UNITED STATES AND ENGLAND

INTRODUCTION

The high stakes testing movement is quickly emerging as one of the mainstays of educational policy in the United States.¹ This is not just an American phenomenon; American high stakes testing policies have largely been modeled after those in England.² Both countries share another component of educational policy in common—a focus on the students that are in the most need of educational assistance, children with disabilities. The intersection of these policies will be the subject of this Note.

The United States has distinct policies and legislation that target children with disabilities.³ Special education legislation has been a vital part of education policy in the United States since the early 1970s. These policies will be described in Part I of the analysis. Part II of this analysis will explore the No Child Left Behind Act of 2001,⁴ the controversial educational policy that imposes accountability measures on schools. Part III will assert that accountability policies and special education policies are often in conflict and that children with disabilities are indeed being “left behind” in the United States.

1. The high stakes testing movement is also referred to as the standards-based reform movement. “This movement has dramatically changed education policy; the focus has shifted from inputs to outcomes, namely what children should know and be able to achieve.” Michael Dannenberg, *Derivative Right to Education: How Standards-Based Education Reform Redefines the Individuals with Disabilities Act*, 15 YALE L. & POL’Y REV. 629 (1997). The theory behind this reform is that children will work harder and achieve more when “challenged with rigorous content and heightened expectations.” *Id.* at 636–37.

There has been much heated debate surrounding the utility of high stakes testing. Many educators and some members of the research community think that high stakes tests negatively distort the teaching process, leading to what has been termed “teaching to the test” and harmful stresses for teachers and children. On the other hand, others believe that high stakes tests are needed to enforce accountability in school districts. See William A. Firestone & David Mayrowetz, *Rethinking “High Stakes”*: Lessons from the United States and England and Wales, TCHRS C. REC. 102, no. 4, 724 (Aug. 2000) (discussing the utility of high stakes testing as a policy tool and using quantitative studies conducted in the United States, England, and Wales as a basis for their findings).

2. In England, the policy at issue is the National Curriculum. See *infra* note 6 and accompanying text. In the United States, the policy under examination is the No Child Left Behind Act of 2001, 20 U.S.C. § 6301 et seq. [hereinafter NCLB]. However, the NCLB has prompted the development of other high stakes exams, such as high school exit exams. See *infra* notes 25–47 and accompanying text.

3. See *infra* Part I.

4. See *infra* Part II.

Part IV will examine England's educational system⁵ as a case study and paradigm for American educators and policymakers on this question of accountability and educating children with disabilities. The English system differs in important ways. For example, the National Curriculum,⁶ the accountability policy in England, allows children with disabilities to "disapply" or be exempt from participating in high stakes assessments altogether. This Note will explore the strengths and weaknesses of the English and American educational systems.

After a detailed analysis in Part V, this Note concludes that special education policies and accountability policies in the United States often conflict with each other and policymakers need to look to other models for viable alternatives. In the English system, educators and policymakers have far more flexibility in assessing student needs, which serves disabled children well. The United States should also learn from the English system that maintaining accountability in schools does not necessitate the use of punitive sanctions. These sanctions place educators in a "catch-22" and the individuals that suffer the most are children with disabilities.

Although the policy may be deeply flawed in its application, the theory behind the NCLB legislation—that all children, regardless of ability, can succeed if educators are held accountable—is a profound and worthy objective. The English system does not share this goal. Instead, children with disabilities are permitted to "disapply" from high stakes examinations with no consequences for the school.⁷ This distinction and others illustrate the complexities of special education laws and their intersection with high stakes testing policies. This Note hopes to illuminate these complexities so as to better assess the question of how educational policies can best serve children with disabilities.

5. For purposes of this Note, I will be comparing the educational system of the United States with that of England. "England" refers solely to the country of England, not the United Kingdom in its entirety. Wales and Scotland are beyond the scope of my analysis.

6. England introduced a National Curriculum under Margaret Thatcher's leadership. State schools are required to adhere to it until students reach the age of fourteen. However, independent or "public" schools (in England, private schools are referred to as public) are not obliged to do so. The National Curriculum is organized on the basis of four key stages with individual progress monitored by standardized assessment tests. Education Reform Act, 1988, c. 40 §§ 1–25 (Eng.), available at <http://www.curriculumonline.gov.uk> (last visited Mar. 21, 2006).

7. See *infra* Part IV.

I. BACKGROUND: U.S. POLICIES THAT PROTECT STUDENTS WITH DISABILITIES

The first American legislation specifically designed to protect American disabled children in school was the Education for All Handicapped Children Act (EAHCA).⁸ This legislation mandated a federal right to a free and appropriate public education (FAPE).⁹ To obtain federal funding, states had to comply with the EAHCA.¹⁰ The EAHCA included specific eligibility criteria for special education services.¹¹ To be deemed eligible, students were tested and evaluated.¹² If eligible, students would receive an Individualized Education Plan (IEP).¹³ The IEP required schools to provide FAPE in the least restrictive environment (LRE) possible,¹⁴ so as not to segregate and stigmatize students with disabilities.

The Individuals With Disabilities Education Act (IDEA)¹⁵ built on the

8. Education of All Handicapped Children Act (EAHCA), Pub. L. No.94-142, 89 Stat. 773 (1975). This law is codified as part of the Individual with Disabilities Education Act (IDEA).

9.

The term “free appropriate public education” [FAPE] means special education and related services that—

(A) have been provided at public expense, under public supervision and direction, and without charge;

(B) meet the standards of the State educational agency;

(C) include and appropriate preschool, elementary, or secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program under section 1414(d) of this title.

20 U.S.C. § 1401(4) (2000).

Generally, courts have held that FAPE is more of a floor than a ceiling. *See, e.g.,* Hendrick Hudson Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 200 (1982) (holding that the free appropriate public education clause of the EAHCA does not require a state to maximize the potential of each handicapped child but rather to provide a “basic floor of opportunity”).

10. States that received funds under the EAHCA had to submit a plan that included the state’s policies and procedures for educating disabled students. Jennifer R. Rowe, *High School Exit Exams Meet IDEA—An Examination of the History, Legal Ramifications, and Implications for Local School Administrators and Teachers*, 2004 BYU EDUC. & L.J. 75, 81–83.

11. 34 C.F.R. § 300.18 (2005).

12. 20 U.S.C. § 1414(a)(1)(C) (2000).

13. 20 U.S.C. § 1415(b), (e), (f) (2000).

14. Rowe, *supra* note 10; *see also* Tom Allen, *The Law of Special Education in the United States and England: Civil Rights and Public Duties*, 25 J.L. & EDUC. 389 (1996).

15. 20 U.S.C. § 1400 et seq. Like the EAHCA, the IDEA requires that disabled children be provided access to an adequate education in the “least restrictive environment” possible. Scholars have advanced the notion that the high stakes testing and standards-based education movement share the same goal, that disabled children not be segregated and stigmatized.

Standards-based education must be provided to disabled children in the regular classroom Otherwise, disabled students would have to be unilaterally segregated either outside or within the regular classroom, both of which are contrary to the provisions of the Act. Thus,

successes of the EAHCA.¹⁶ The IDEA was reauthorized in 2004 and some additional amendments were added.¹⁷ Congress pronounced that the purpose of the IDEA was to ensure that all children with disabilities receive educational services “designed to meet their unique needs” and “receive an education that is both appropriate and free.”¹⁸ As in the EAHCA, the IEP is the instrument utilized to achieve this end. The IEP is a written statement that is developed by an IEP team to accommodate the student’s disability.¹⁹ The IEP team consists of representatives from a local agency, the child’s teacher, the child’s parent or guardian, and when appropriate, the child.²⁰

The final policy that protects students with disabilities is section 504 of the Rehabilitation Act.²¹ Section 504 is a civil rights act which makes it

pursuant to the IDEA, when there are disabled children present, an education based on state-defined academic standards must be provided in the regular classroom to all children.

Dannenber, *supra* note 1, at 54. In this way, the two policies are synchronized; both have, at their heart, the basic ideal of educating disabled students to the best of their ability, in the least restrictive, and, arguably, the least stigmatizing environment possible.

16. EAHCA, *supra* notes 8–15 and accompanying text.

17. Individuals With Disabilities Education Improvement Act of 2004 [IDEA], Pub. L. No. 108–446, 118 Stat. 2647 (2004) (codified as amended in scattered sections of 20 U.S.C.). The 2004 amendments to IDEA expressly reference NCLB, clarifying some of the inherent tensions that had arisen before the reauthorization. These references include: “All children with disabilities are included in all general state and districtwide [sic] assessment programs.” *Id.* § 612(a)(16)(A). Additionally, the amendments address specifically how states should provide appropriate accommodations and alternate assessments for students with disabilities. *Id.* § 612(a)(16)(D); *see also* IDEA Reauthorized Statute, <http://www.wrightslaw.com/idea/osep/assessments.pdf> (last viewed Mar. 21, 2006).

18. 20 U.S.C. § 1412(a)(1) (2005).

19. 20 U.S.C. §§ 1401(1), (2) (2005).

20. There are six vital elements that comprise the IEP: (1) a statement of the child’s present educational performance level; (2) a statement of the child’s annual goals; (3) a statement of the specific educational services to be provided to the child; (4) a statement of the student’s transition services; (5) the date and duration of educational services; and (6) objective criteria and evaluation procedures to determine if these objective criteria are being met. *See* DEP’T. EDUC., A GUIDE TO THE INDIVIDUALIZED EDUCATION PROGRAM 5, <http://www.ed.gov/parents/needs/speced/iepguide/iepguide.pdf> (last visited Apr. 8, 2006). In terms of high stakes testing, under the IDEA, the child’s IEP team is to make decisions about participation in state and district-wide assessments and any accommodations and modifications the child needs and will receive. *Id.*

21. Pub. L. No. 93-112, 87 Stat 355 (codified as amended 29 U.S.C. § 794). Even though this is the last policy that I discuss that protects students with disabilities; it was the first policy that was enacted in the United States. I discuss this policy after the IDEA because it is less comprehensive and offers fewer protections than the IDEA.

The history behind the creation and passage of section 504 is fascinating, as it was merely a “legislative afterthought.” JOSEPH P. SHAPIRO, NO PITY 65 (1994). President Nixon had vetoed two earlier versions of the legislation of which section 504 was later a part. *Id.* However, in a later version, “at the very end of the bill were tacked on four unnoticed provisions—the most important of which was Section 504 . . . congressional aides could not even remember who had suggested adding the civil rights protection . . . there had been no hearings and no debate about Section 504.” *Id.* Senator Hubert Humphrey was the senator who introduced section 504. His daughter had Down’s Syndrome and the

illegal to discriminate against persons because of their disabilities.²² Although a civil rights act, “Section 504 is also used to develop education plans for students who meet the section 504 definition of a disability, rather than an IDEA definition.”²³ Section 504 not only prohibits state departments of education and local school districts from developing policies that limit disabled children from participating in assessments, it also prohibits denying these students the benefits accrued from participating in these assessments, namely promotion to the next grade, and ultimately graduation.²⁴

local school had turned her away, refusing to accommodate her needs. As a result of this incident, Senator Humphrey introduced section 504.

“The wording of Section 504 was copied straight out of the Civil Rights Act of 1964, which ruled out discrimination in federal program on the basis of race, color, or national origin.” *Id.* The statute states: “No otherwise qualified handicapped individual in the United States shall, *solely by reason of his handicap*, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 29 U.S.C. § 794 (2002) (emphasis added). Thus, it became illegal for federal agencies, public schools, or any other institution receiving federal funding to discriminate against an individual “solely” on the basis of their disability.

There is no funding provision in section 504; it states that if a school district or state education agency, or even a private facility, receives federal funds, then it must abide by section 504 if it wishes to keep receiving federal money. Regardless of this federal mandate, disability rights activists argue that disabled students are still discriminated against in school. They argue that students with disabilities often receive a “second-class education.” SHAPIRO, *supra*, at 175. “Some 67 percent are still taught in separate schools, classes, and resources rooms, while only 31 percent spend most of their day in a regular classroom . . . [f]orty percent of students with disabilities drop out of school, compared to only 15 percent of their nondisabled peers.” *Id.* at 174. *See also* Lynn Olson, *Enveloping Expectations*, EDUC. WK., Jan. 8, 2004, <http://counts.edweek.org/sreports/qc04/article.cfm?slug=17ovrvw.h23> (last visited Mar. 21, 2006).

Activists attribute this disparity to the fact that students with disabilities are often seen as a burden by school districts; they are “separated and given low priority . . . teachers often expect too little, coddling disabled kids and teaching them less.” SHAPIRO, *supra*, at 174. Arguably, these expectations have been altered by the passage of NCLB, in which disabled students are now often held to the same standards as their non-disabled peers. *See supra* note 3.

22. 29 U.S.C. § 794 (2002).

23. Initially, when it was passed in 1973, section 504 focused almost totally on building accessibility for persons with physical disabilities. Much later it was used to develop education plans for students who met the section 504 definition of a disability, rather than an IDEA definition.

Students with a 504 plan have less procedural safeguards than do students with an IEP under the IDEA. Unlike the IDEA, section 504 authorizes that a lower threshold be met, namely that equivalent access to educational and extracurricular programs be provided. A 504 plan is:

[d]esigned for students whose needs are not severe enough to warrant special education services . . . [it] gives students access to educational services, just as a ramp gives wheelchair-bound individuals access to a public building, but it is a somewhat less intensive plan of intervention than what is usually included under special education.

David Gold & Thomas Stacy, *Navigating Special Ed*, <http://www.cwla.org/voice/0512navigating.htm> (last visited Apr. 2, 2006).

24. 29 U.S.C. § 794 (2002).

II. THE NO CHILD LEFT BEHIND ACT

The No Child Left Behind Act (NCLB) is a landmark educational policy.²⁵ Since our country's inception, education has been controlled by local entities.²⁶ This tradition has been transformed by the NCLB,²⁷ which gives the federal government an unprecedented amount of control over education.²⁸ Congress has attached conditions to the receipt of federal funds; the schools must abide by the mandates of the NCLB.²⁹ Under the NCLB, students must make "adequate yearly progress" (AYP),³⁰ so that

25. Pub. L. No. 107-110, 115 Stat. 1425 (2001) (codified at 20 U.S.C. § 6301 et. seq.). The NCLB is spending clause legislation, and "[t]he courts have interpreted the spending clause to authorize Congress to attach strings to the appropriation of federal funds so long as the conditions for the acceptance of federal funds are clear and unambiguous." Ronald D. Wenkart, *The No Child Left Behind Act and Congress' Power to Regulate Under the Spending Clause*, 174 EDUC. L. REP. 589 (2003).

This is a landmark policy because it is among the first education statutes enacted that has a national scope. The U.S. Constitution does not provide explicitly for a federal right to an education. Instead, educational rights are often delineated in state constitutions.

The other reason the NCLB is a landmark policy is because the amount of student testing it requires is unprecedented. Federal law has never before required such extensive testing. In 2005–2006, every student—including students with disabilities—must be assessed in reading/language arts and mathematics every year in grades three through eight, and at least once in grades nine through ten. In addition, beginning in 2007–2008, all students must be assessed in science at least once in grades three through four, six through nine, and ten through twelve. NAT'L ASSOC. ST. DIR. SPECIAL EDUC. & NAT'L EDUC. ASS'N, IDEA AND NCLB: THE INTERSECTION OF ACCESS AND OUTCOMES (2004), <http://www.nea.org/specialed/images/ideanclbintersection.pdf> (last visited Apr. 8, 2006) [hereinafter INTERSECTION OF ACCESS AND OUTCOMES].

26. See Wenkart, *supra* note 25, at 591.

27. "With the passage of the [NCLB], the federal government has expanded its role from funding education to determining the policy and direction of education in every school in the United States. The result is a historic shift in the balance of power . . . in the development of educational policy." *Id.* at 589.

28. The balance of power in creating educational policy now has shifted profoundly toward the federal government. See Wenkart, *supra* note 25.

29. Dep't Justice, Civil Rights Forum, vol. 10, no.3 (Fall 1996), <http://www.usdoj.gov/crt/cor/Pubs/forum/96fall.htm> (last visited Apr. 8, 2006).

30. 20 U.S.C. § 6316 (2002); 20 U.S.C. § 7325 (2002). The NCLB states that adequate yearly progress shall be defined by the state in a manner that:

- i. applies the same high standards of academic achievement to all public elementary and secondary school students in the state;
- ii. is statistically valid and reliable;
- iii. results in continuous and substantial academic improvement for all students;
- iv. measures the progress of public elementary school, secondary schools and local educational agencies and the state based primarily on the academic assessments developed by the state;
- v. includes separate measurable annual objectives for continuous and substantial improvement for [economically disadvantaged students, students from major racial and ethnic groups, students with disabilities, students with limited English proficiency and all students];
- vi. . . . includes graduation rates for public secondary students and at least one other academic
- vii. indicator . . . for public elementary school students; and

they do not become one of our nation's "failing schools." After a school has failed to make AYP for two years, parents have the unqualified right to transfer their children to another district school that is not in need of improvement.³¹ If the district does not have an acceptable school, parents have a qualified right to transfer children to schools run by other local educational agencies in the area.³²

Part of the accountability system that is mandated under the NCLB includes specific requirements for students with disabilities, and thus implicates the IDEA.³³ Under the NCLB, states must test at least ninety-five percent of their students with disabilities.³⁴ They also have to incorporate test scores of all subgroups of students, including those with disabilities, into school ratings and provide test results to the public on

viii. includes, at the State's discretion . . . other academic indicators

20 U.S.C. § 6311(b)(2)(C) (2002). Accordingly, students with disabilities are included in the AYP target goals, and, thus, must participate in the NCLB-required annual assessments in all of their subjects, including reading, language arts, and mathematics. However, appropriate accommodations or alternate assessments may be provided as needed. Students with disabilities must also participate in the NCLB-required science assessments beginning in 2007–2008. *See* INTERSECTION OF ACCESS AND OUTCOMES, *supra* note 25.

31. 20 U.S.C. § 6316(b)(1)(E) (2002).

32. This right is not absolute because school districts must enter into cooperative agreements with other local educational agencies. If school districts are unable to establish this agreement, students may not be able to transfer. *See* Amanda Paulson, *In Failing Schools, How Real is the Transfer Option?*, CHRISTIAN SCI. MONITOR, May 19, 2004, <http://www.christiansciencemonitor.com/2004/0519/p03s01-usgn.htm> (last visited February 5, 2006).

33. Some scholars argue that the conflation of these two policies causes a great deal of conflict, as the policies are so inherently different. "The individualized nature of IDEA is totally inconsistent with the group nature of NCLB, even though they talk about classes of kids who are disabled." *See* Olson, *supra* note 21.

In addition to the apparent dissonance of these policies, serving all of these interests simultaneously is not possible for teachers who have a finite amount of time and energy. *Id.* Special accommodations used to be readily afforded to special education students; now the NCLB tests are taking away from the specialized level of attention that students with disabilities used to receive. Due to increasing pressures, teachers have to turn their attention to NCLB and other high stakes tests so that their schools will not be labeled "failing" and also so that they may retain their jobs. *Id.* Arguably, this is detrimental to students with disabilities.

34. *See* 20 U.S.C. § 6311(b)(2)(C)(v)(II) (2002). AYP is based primarily on the student assessment tests, but is also based on the rate of student participation in the assessment tests—95% participation is currently required for the school and district, and for each of the subgroups prescribed under NCLB, namely students with disabilities. 20 U.S.C. § 6311(b)(2)(I)(ii) (2002). "For a school to make AYP, every student subgroup must meet the year's benchmark." Barry L. Newbold, *The Faceless Mandates of NCLB*, 41 KAPPA DELTA PI RECORD 7 (Fall 2004), available at http://kdp.org/pdf/rf04_newbold.pdf (last visited Apr. 8, 2006). The other subgroups include students who are economically disadvantaged, members of racial and ethnic minorities, and students who are limited-English proficient (LEP). *Id.* "Schools that fail to make AYP two years in a row are identified for 'school improvement' and receive sanctions under the rules of NCLB. It's a plan that looks good on paper, but one that raises serious questions when analyzed in terms of the effects on real students." *Id.* at 8.

report cards.³⁵ The long-term goal is to have all students performing at the proficient level on state tests by 2013-2014.³⁶ Schools that do not make AYP toward that goal face a series of sanctions, the severity of which increases with each year they fail to meet their achievement targets.³⁷

Within the next ten years, children with disabilities must be performing at “proficient” levels alongside their non-disabled peers.³⁸ There are 6.6 million children with disabilities in the United States.³⁹ Before the passage of the NCLB, these students were largely excluded from state testing and accountability systems.⁴⁰ Now, there is enormous federal pressure on school districts to incorporate these students into this testing culture.⁴¹ The

35. INTERSECTION OF ACCESS AND OUTCOMES, *supra* note 25.

36. *Id.*

37. NAT'L COUNCIL ON DISABILITY, IMPROVING EDUCATIONAL OUTCOMES FOR STUDENTS WITH DISABILITIES (2004), available at <http://www.educationalpolicy.org/pdf/NCD.pdf> (Feb. 6, 2006) [hereinafter IMPROVING EDUCATIONAL OUTCOMES]. Sanctions are not the vehicle that should be used to ensure compliance. The main reason why states cannot meet these benchmarks even before sanctions are imposed is lack of funding. States report that “several problems make it difficult for them to meet the NCLB deadlines, including low teacher pay, and the lack of incentive pay, and severe shortages in some subjects.” Anne C. Lewis, *Who's Qualified?* EDUC. DIGEST 69 no. 2 (2003). These requirements are even more difficult to meet in high-poverty areas, thus the schools that NCLB was designed to help the most also stand to be the most penalized. *Id.*

38. This seems highly unlikely considering the great disparities in performance levels between disabled students and their non-disabled peers:

Thirty of the 39 states that provided complete data had an achievement gap between special education and general education students on 4th grade reading tests of 30 percentage points or more. In Arkansas, Iowa, Montana, New Hampshire, Oklahoma, and Vermont, the gap was more than 50 percentage points. Gaps in 8th grade reading tended to be even worse. Only five of the 39 states—Michigan, Mississippi, Nebraska, South Carolina, and Texas—reported achievement gaps of less than 30 percentage points. Thirty-two of 36 states showed gaps larger than 30 percentage points on their 10th grade reading exams.

Olson, *supra* note 21.

These results show that states are often not able to meet the required performance level in the disability subgroup. This striking disparity shows the deep flaws in the NCLB and its intersection with disability policy. Additionally, these results could have unexpected negative consequences: “We’re very concerned about the unintended consequences of holding schools accountable for [the disability] population. We’re sensitive to the potential for pushing students out, for scapegoating students, for identifying these students as the reason that a school or a district isn’t measuring up.” Mitchell D. Chester, IMPROVING EDUCATIONAL OUTCOMES, *supra* note 25, at 28 (quoting Mitchell D. Chester, assistant superintendent for policy development in the Ohio education department).

39. Parent Advocacy Coalition for Educational Rights, Frequently Asked Questions, <http://www.pacer.org/help/faq.htm> (last visited Feb. 5, 2006).

40. The pendulum has swung too far in the other direction. A middle ground must exist between wholly excluding disabled students and holding them to the same standards as their non-disabled peers. Surveyed teachers also agree that mandating the same state standards for both disabled and non-disabled students does not seem reasonable. “More than eight in 10 teachers believe that most special education students should be expected to meet a separate set of academic standards . . . [and] should be given alternative assessment measures, rather than being required to take the same tests as general education students.” Olson, *supra* note 21, at Large Performance Gaps.

41. This pressure has been noted by school districts, teachers, policymakers, and parents nationwide. See Ryan R. West, *The Fallacy Behind Increased Accountability: How Disabled Students'*

question becomes: should school districts be forced to adhere to this federal mandate, which requires the testing of students with disabilities? And if so, what sort of accommodations and modifications should be made for these children in accordance with special education laws?

III. CENTRAL ISSUE: ARE STUDENTS WITH DISABILITIES BEING LEFT BEHIND?

With the re-election of President George W. Bush, the NCLB is here to stay, at least until 2008. Thus, a close examination of the policy and both its legal and educational consequences is especially timely. Of particular significance is the intersection of NCLB with educational disability policies.⁴² There is a divergence of opinion, whether the expectations established in NCLB yield positive or negative results for students with disabilities.⁴³ This Part will argue that although it is important to maintain high expectations for students with disabilities, the bar that has been set by NCLB and the high stakes testing movement is unrealistic and unfair, leaving students with disabilities “behind” by further stigmatizing them.

As clearly outlined in the policy, NCLB affects students with disabilities:

- 1) [s]tudents with disabilities must be taught the general education curriculum by “highly qualified” teachers using research-based strategies;
- 2) [s]tudents with disabilities are expected to learn challenging academic content;
- 3) [t]hey, with very few exceptions, are expected to take and pass the grade level State tests; and
- 4) [t]heir test scores must be reported and must be counted in school and district ratings.⁴⁴

These four statements of policy are completely incongruous with special education policies such as the IDEA⁴⁵ and section 504.⁴⁶ “In short,

Constitutional Rights Have Been Disregarded in a Rush to Implement High-Stakes Exams, 2002 BYU EDUC. & L.J. 351.

42. See IMPROVING EDUCATIONAL OUTCOMES, *supra* note 25.

43. *Id.*

44. See INTERSECTION OF ACCESS AND OUTCOMES, *supra* note 25.

45. See *supra* notes 31–35 and accompanying text.

46. See INTERSECTION OF ACCESS AND OUTCOMES, *supra* note 25.

the special education mantra that ‘All Children Can Learn’ has been changed to ‘All Children Can Learn to High Standards.’”⁴⁷

A. High Stakes Tests

As part of NCLB, there are state-wide assessments that must be conducted.⁴⁸ Additionally, although not directly mandated by NCLB, high school exit exams⁴⁹ have become a major part of the accountability culture, and have developed in tandem with NCLB.⁵⁰ “For states using high stakes testing, the test becomes both the state’s exit requirement for students and the state’s assessment instrument measuring NCLB’s students’ annual yearly progress.”⁵¹ High school exit exams are extremely

47. See Herner, *supra* note 21.

48. The assessments mandated in NCLB are distinct from other high stakes tests, i.e., tests that can have significant consequences, such as high school exit exams. “NCLB does not necessarily require a high-stakes test, it is an accountability test—not necessarily the same thing.” IMPROVING EDUCATIONAL OUTCOMES *supra* note 37, at 47. However, the growing prevalence of exit exams and other forms of high stakes tests are most likely an outgrowth of the standards-based accountability features of NCLB.

Approximately thirteen states use standardized tests to determine whether a student is promoted or retained. Some states have proposed using test results to determine eligibility for state universities or even employment. See DISABILITY RIGHTS ADVOCATES, DO NO HARM—HIGH STAKES TESTING AND STUDENTS WITH LEARNING DISABILITIES (2001), http://www.dralegal.org/publications/do_no_harm.php (last visited Feb. 6, 2006) [hereinafter DO NO HARM].

49. High school exit exams are widespread internationally. A more recent look at the international scene was reported in 1997 in Harold W. Stevenson & Shin-ying Lee, *International Comparisons of Entrance and Exit Examinations* (1994), http://eric.ed.gov/ERICDocs/data/ericdocs2/content_storage_01/0000000b/80/22/9c/11.pdf (last visited Feb. 6, 2006). From their study of Japan, the United Kingdom, France, and Germany, they observed:

Entrance and exit examinations in these countries are based on a curriculum established by ministries of education at the local, regional, or national level. Rather than imposing some arbitrarily defined standard of achievement, the examinations are closely tied to what the students have studied in high school. Because teachers are aware of what students are expected to know in examinations, it becomes their responsibility to equip students with the information and skills needed to pass the examination.

Id. at 47.

The authors also asserted a position on the nature of the examinations themselves: “These examinations typically include open-ended questions that require organization and application of knowledge, and oral examinations that require students to express themselves verbally.” *Id.*

Faced with mounting pressure to keep pace with the rest of the world, the United States is rapidly incorporating these exit examinations into its education system: “As of Fall 2000, [twenty-three] states require students to pass a high school ‘exit exam’ to receive a high school diploma; another seven states plan to adopt exit examinations within the next three years.” DO NO HARM, *supra* note 48. Additionally, these high stakes tests are also used as a basis for other important decisions, namely “whether a student is eligible for scholarships, advanced placement, and honors classes.” *Id.*

50. The modifications and alternate assessments that have been developed to assist students, as well as the litigation that has ensued as a result, is discussed in Part III.B.

51. Ralph D. Mawdsley & J. Joy Cumming, *School District Accountability, Special Education Students, and the Dilemma of High Stakes Testing: An Australia-United States Comparison*, 188

important, because they determine whether a student will graduate from high school.⁵²

High stakes assessments often unfairly discriminate against students with disabilities.⁵³ “Many school districts do not provide disabled children with early, intensive remediation, and children with special educational needs are not being taught the skills they must master to pass these tests. When students fail, they pay a high price—they are either not promoted or cannot graduate from school.”⁵⁴ While high stakes tests arguably pose a problem for all students, for students with disabilities these tests are discriminatory.⁵⁵ The very laws that were designed to protect disabled children are not accomplishing their purpose.⁵⁶ The Department of Education recently addressed this inequity, by providing more flexibility for educators in providing modifications and alternate assessments for students with disabilities.⁵⁷

B. Modifications for Assessments

The interplay between high stakes testing and special education comes to a head when the subject of modification or exemption is addressed.⁵⁸ Under IDEA and section 504, accommodations and alternate assessment systems must be made available to disabled students.⁵⁹ Under IDEA, the

EDUC. L. REP. 1 (2004).

52. Students with disabilities who might otherwise have been able to receive a diploma using some alternate form of assessment may now find themselves without a diploma unless they take and pass the state’s high stakes test. See HEUBERT & HAUSER, *infra* note 58.

53. See generally DO NO HARM, *supra* note 48.

54. Peter W. D. Wright & Pamela Darr Wright, *High Stakes Testing (1999–2005)*, available at <http://www.wrightslaw.com/info/highstak.index.htm> (last visited Feb. 6, 2006).

55. DO NO HARM, *supra* note 48.

56. See *supra* notes 10–24 and accompanying text.

57. See *infra* note 68 and accompanying text.

58. Scholars argue that the higher the stakes associated with the assessment, the greater the need to protect the legal rights of the disabled student. “As a general rule, the greater the potential harm to students, the greater the protection to which they are entitled, and the more vulnerable the assessment is to legal challenge.” JAY P. HEUBERT & ROBERT M. HAUSER, *HIGH STAKES: TESTING FOR TRACKING, PROMOTION, AND GRADUATION* (Jay P. Heubert & Robert M. Hauser eds., National Academy Press 1999). See also Perry A. Zirkel, *High Stakes Testing Accommodations and Modifications for Students with Disabilities*, 155 EDUC. L. REP. 13 (2001).

59. DO NO HARM, *supra* note 48. There have been several other important high stakes testing cases. In California, a group of parents with the help of a disability rights advocacy group persuaded a federal district court judge to order California to make accommodations for students with disabilities on a high stakes, state-wide exam. This holding applied to at least 45,000 tenth-graders with disabilities. “It also found that the state’s waiver policy was unlikely to satisfy IDEA requirements for alternate assessment and ordered the state to quickly develop an alternative assessment for those students with disabilities, make it impossible for them to take the conventional test.” Paul T. O’Neill, *High Stakes Testing Law and Litigation* 2003 B.Y.U. EDUC. & L.J. 623, 652 (2003).

IEP team determines what accommodations must be made for students with disabilities so that they can participate in the statewide assessments.⁶⁰ The definitions of modification and exemption have been the subjects of much litigation.

Litigation regarding disability testing has been filed in numerous states.⁶¹ In some states, such as Alaska, there have been victories for students with disabilities.⁶² In other states, the claims of students with

However, in September 2002, the Ninth Circuit reversed and held that the district court could not prohibit the state from exercising its traditional authority to set diploma requirements. *Id.* at 653. The Ninth Circuit also held that questions of whether the state is remiss in not yet having established an alternate assessment was not ripe for adjudication. *Id.* The court did uphold the district court's determination that students with disabilities must be able to take the California exam with those accommodations and modifications provided in their IEP or section 504 plans. *Id.*

The reality is that many of these tests are not properly developed, leading to high failure rates, increased numbers of students dropping out of school, and loss of self-esteem and educational advancement.

60. The subject of modifications has been heated and has led to litigation in a few instances. Unlike in England, where disabled students can be exempted or "disapply" from assessments, the United States does not allow for exemptions:

The only students with disabilities who are exempted from participation in general State and district-wide assessment programs are students with disabilities convicted as adults under State law and incarcerated in adult prisons With this statutory exception, there should be no language in State or district assessment guidelines, rules, or regulations that permits IEP teams to exempt students from State or district-wide assessment programs.

OSEP Memorandum, Questions & Answers About IDEA, Students with Disabilities and State and District-wide Assessment, Aug. 24, 2000, <http://www.wrightslaw.com/law/osep/faqs.idea.assessment.htm#accountability> (last visited Feb. 26, 2006).

The question of whether disabled students can be exempt from assessment raises issues that get to the heart of the disability rights movement. "[T]he new thinking by disabled people that there is no pity or tragedy in disability, and that is society's myths, fears, and stereotypes that most make being disabled difficult." SHAPIRO, *supra* note 21, at 5. In many ways, NCLB is in accordance with this philosophy; holding disabled students to the same standards as their non-disabled peers. This not only empowers the students themselves, but also dispels stereotypes and stigmas associated with disabled students.

There are other positive reasons why children with disabilities should not be excluded from district-wide assessments:

A more accurate picture of aggregate student performance is produced when all students are included; comparisons of test results among schools or districts will not be valid if participation rates of student with disabilities vary from one place to the next. Individual's scores also provide important information to students, their parents, and their teachers. In addition, education reforms and the allocation of resources and extra services are increasingly driven by these test results; if students with disabilities were not included, then the resulting reforms would be less likely to meet their needs.

HEUBERT & HAUSER, *supra* note 58, at 194-95.

61. These states include Alaska, Oregon, California, and Massachusetts. See Melanie N. Henry, *No Child Left Behind? Educational Malpractice Litigation for the 21st Century*, 92 CAL. L. REV. 117 (2004); Tico A. Almeida, *Refocusing School Finance Litigation on At-Risk Children: Leandro v. State of North Carolina*, 22 YALE L. & POL'Y REV. 525 (2004).

62. See *infra* notes 63-71 and accompanying text.

disabilities have been set aside. However, the fact that this issue has been litigated, illustrates that this is an area of the law that is far from settled.

In *Noon v. Alaska*,⁶³ a class action suit filed in Alaska against the Alaska Department of Education and Early Development and the Anchorage School District,⁶⁴ alleged that the High School Graduation Qualifying Examination (HSGQE) violated federal and state law relating to students with disabilities. At the time the case was filed, DRA had projected that at least five hundred students in the class of 2004 would be denied diplomas because they were deprived of the opportunity to pass the HSGQE,⁶⁵ and as a result, these disabled students dropped out of school. Fortunately, in an important settlement agreement,⁶⁶ the plaintiffs were able to secure a favorable result: an immediate waiver of the HSGQE graduation requirement for every student with an IEP or 504 Plan in the class of 2004.⁶⁷

While the settlement in *Noon v. Alaska* was indeed a victory for the class members, many questions surrounding disability testing were left unanswered.⁶⁸ The settlement did not satisfactorily address future accommodations⁶⁹ that would be made for children with disabilities;

63. *Noon v. Alaska State Bd. of Educ. and Early Dev.*, 2005 WL 2414994 1 (D. Alaska 2005) (unpublished).

64. *Id.*

65. Disability Rights Advocates, *DRA Reaches Landmark Settlement with State of Alaska to Protect Students with Disabilities*, http://www.draregal.org/cases/education_testing/noon_v_alaska.php (last visited Apr. 8, 2006).

66. *Id.*

67. The settlement agreement detailed:

For school year 2004–05 only, a District shall grant a waiver to a student with a disability who has an IEP or 504 Plan, is a senior, and has met all other requirements of graduation, and the student's IEP or 504 Plan team does not meet on or before September 24, 2004, and because of the failure to meet:

- a. the student does not have two opportunities during the 2004–2005 school year to use an allowable modification that an IEP or 504 Plan team determines the student needs to demonstrate proficiency on the state assessment; or
- b. the student does not receive the non-standardized assessment for which the student is eligible during the 2004–2005 school year.

Settlement Agreement, <http://www.draregal.org/downloads/cases/noon/settlement.txt> (last visited Apr. 8, 2006).

68. The Department of Education, in response to lawsuits such as these, offers guidance to states and educators about modifications in the NCLB assessments. *See generally* Press Release, Dep't of Educ., *Spellings Announces New Special Education Guidelines, Details Workable, "Common-Sense" Policy to Help States Implement No Child Left Behind*, May 10, 2004, <http://www.ed.gov/news/pressreleases/2005/05/05102005.html>. Perhaps states will utilize this framework when formulating the guidelines for their own high stakes tests.

69. A recent example illustrates the ways in which these policies conflict. The Department of Education recently issued a new rule saying disabled students who must use a calculator or other device when taking a test will be marked absent and their exam will not be counted under NCLB.

rather, it dealt only with class members.⁷⁰ Hopefully, the Alaska legislature will address this critical question about the HSGQE and students with disabilities.⁷¹

IV. CASE STUDY: CONVERGENCE OF TESTING AND SPECIAL EDUCATION IN ENGLAND⁷²

A. National Curriculum

In England, the Education Reform Act 1988⁷³ requires all state-maintained schools to teach a standardized “National Curriculum.”⁷⁴ The 23,000 state-maintained schools in England collaborate with 150 Local Education Authorities (LEAs)⁷⁵ to generate a federal National Curriculum, which establishes the minimum educational entitlement of students of

However, schools are required by the IDEA to let students use such tools if they have a disability that impairs their ability to read or do math. Clearly, these policies clash; if schools and educators allow children to use the modifications allowed under the IDEA, this may place the school at risk under NCLB. How are we protecting children with disabilities by prohibiting the very modifications that have been in existence long before the passage of NCLB? How should teachers and educators best respond to this conflict?

70. See Settlement Agreement, *supra* note 67.

71. “Several bills have been introduced by legislators on both sides of the aisle in the State Senate and House, revealing bipartisan support for fixing the problems with the HSGQE.” *Alaska Students with Disabilities Can Graduate with Diploma in 2004 Without Passing Exit Exam*, available at <http://www.wrightslaw.com/news/04/high.stakes.ak.0410.htm> (last visited Feb. 6, 2006).

72. Singapore is another case study where high stakes testing has become ingrained in the culture. The competition is extremely fierce. Parents are pouring money into tutoring and additional educational services in order to prepare their children for these tests. The United States should see in Singapore a cautionary tale of what may be to come.

73. Education Reform Act, 1988, c. 40, §§ 1–25 (Eng.). In the 1980s, England transformed its education system under the reign of Margaret Thatcher. IVOR GOODSON, *THE MAKING OF CURRICULUM: COLLECTED ESSAYS 202* (Ivor Goodson ed., Falmer Press 1995) (1988). “The full force of conservative animosity was directed at the comprehensive school system itself and re-establishing the priority of the old ‘grammar school’ subjects . . . [o]ld social hierarchies were to be revived, reinstated and legislated as national.” *Id.*

74. Education Reform Act §§ 1–25. The National Curriculum must provide a “balanced and broadly based curriculum which (a) promotes the spiritual, moral, cultural, mental and physical development of pupils at the school and of society; and (b) prepares such pupils for the opportunities, responsibilities and experiences of adult life.” Tom Allen, *The Law of Special Education in the United States and England: Civil Rights and Public Duties*, 25 J.L. & EDUC. 389, 403 (1996) (citing Education Reform Act).

75. A Local Education Authority (LEA) is the part of a council in England that is responsible for education within that council’s jurisdiction. See generally Dep’t for Educ. and Emp., *The Role of the Local Education Authority in School Education*, available at <http://www.dfes.gov.uk/learole/policypaper/locaedu.pdf> (last visited Apr. 8, 2006). LEAs are in charge of all state schools in their area: they organize funding for the schools, allocate the number of places available for pupils at each school, and employ all teachers at the schools. *Id.*

compulsory school age (five to sixteen years).⁷⁶ The National Curriculum,⁷⁷ sets attainment targets and also describes how performance will be “assessed and reported.”⁷⁸ The Quality and Curriculum Authority (QCA) administers the national tests, given in accordance with the National Curriculum.⁷⁹ These tests are taken by students at ages seven, eleven, and fourteen.⁸⁰

The National Curriculum applies to all children, including those with disabilities.⁸¹ Established in the 1988 Education Reform Act, the National Curriculum outlines the tests given each for year for English children, including children with disabilities.⁸²

B. Special Education in England

In England, disabilities are referred to as special education needs (SEN).⁸³ The English counterpart to the IEP is the “statement.”⁸⁴ Like the

76. Jane Hannaway et al., *Leave No City Behind: England/United States Dialogue on Urban Education Reform* (2004), available at http://www.urban.org/UploadedPDF/311123_LNCB.pdf (last visited Feb. 6, 2006).

77. The National Curriculum establishes what every child should learn in school on a national level. This federalized curriculum gives teachers a framework. It also set standards that measure how well children are doing in each subject. See National Curriculum of England, available at <http://www.nc.uk.net> (last visited Mar. 20, 2006).

78. Kelvin Gregory & Marguerite Clarke, *High-stakes Assessment in England and Singapore*, THEORY INTO PRAC. 67 (Winter 2003).

79. National Curriculum, *supra* note 77.

80. The student assessments under the National Curriculum begin in England at age seven. *School Tests: Who Takes What*, BBC NEWS WORLD EDITION, Nov. 10, 2004, http://news.bbc.co.uk/2/hi/uk_news/education/2994018.stm (last visited Feb. 5, 2006). Children are required to take national tests in English and mathematics. *Id.* These tests are graded within the school, and the results are available locally. *Id.* “From 2005, pupils will still be tested but there will be greater emphasis on assessments by teachers, who will decide the level achieved.” *Id.*

The next set of assessments under the National Curriculum occurs at age eleven. *Id.* National tests are administered in English, mathematics, and science. *Id.* The tests are sent out to be graded externally. *Id.* As these tests are deemed more important because the children are older, the schools’ results are published nationally. *Id.*

The third set of tests is given to English students at age fourteen in the subjects of English, mathematics, and science. *Id.* Again, these tests are graded outside of the school and the results are published nationally. *Id.* “The Qualifications and Curriculum Authority (QCA) is responsible for the national curriculum tests in England through its new subsidiary, the National Assessment Agency.” *The School Test Season is Here*, BBC NEWS WORLD EDITION, May 4, 2004, http://news.bbc.co.uk/2/hi/uk_news/education/3674989.stm (last visited Feb. 6, 2006).

81. *Id.*

82. See *supra* note 75 and accompanying text.

83. Contact a Family Factsheet: Special Educational Needs-England, <http://www.cafamily.org.uk/educatio.html> (last visited Feb. 6, 2006).

84. Robin C. Richmond, *Inclusive Schools, the Quality of Education and OFSTED School Inspection*, in SPECIAL EDUCATIONAL PROVISION IN THE CONTEXT OF INCLUSION: POLICY AND PRACTICE IN SCHOOLS 56 (Janice Wearmouth ed., 2001).

IEP, a statement outlines the student's special education needs as well as non-educational needs, states objectives and monitoring arrangements for the student, and finally, identifies the school placement of the student.⁸⁵

Inspectors play an important role in the special education process in England. They are required to judge "[t]hat, overall pupils . . . with statements of SEN . . . have their entitlement to a broad and balanced curriculum . . . [and that] pupils have full access to the whole of the school's curriculum."⁸⁶ It is the inspectors who ensure that SEN policies, and particularly statements, are being properly applied in schools.⁸⁷ There is no counterpart to the English inspector in American special education where they serve as a vital enforcement mechanism on behalf of English students with disabilities.⁸⁸

C. *Modification and Disapplication for Assessments*

English policies treat the subject of modification quite differently than the United States. Special arrangements can be made for students with SEN to accommodate their needs on National Curriculum tests:

Some special arrangements, such as extra time, require permission of the QCA, but schools do not require permission for most other arrangements such as using colored overlays, or taping versions of written tests. Some children performing well below the expected level for their age are only assessed by teachers and do not take the tests.⁸⁹

The last aspect, that some students are only assessed by teachers, is markedly different from NCLB, which requires that *all* students,

85. Teachernet, Teaching in England: Statutory Assessment, <http://www.teachernet.gov.uk/teachinginengland/detail.cfm?id=395> (last visited Feb. 7, 2006).

86. See Richmond, *supra* note 84, at 56. The National Curriculum Inclusion Statement sets out three principles that are essential to developing a more inclusive curriculum: "1) setting suitable learning challenges 2) responding to pupils' diverse learning needs 3) overcoming potential barriers to learning and assessment for individuals and groups of pupils." Dep't for Educ. and Skills, *Disapplication of the National Curriculum (Revised)*, http://www.dfes.gov.uk/disapply/pdfs/1990_Guidance.pdf (last visited Apr. 8, 2006).

Additionally, The National Curriculum includes suggestions on ways in which these inclusion principles might be incorporated into the science curriculum. Inclusive Sci. and Special Educ. Needs (ISSN), Project Aims and Politics, *available at* http://www.issen.org.uk/aims_inc_nuk.htm (last visited, Apr. 8, 2006). "The extent to which entitlement and access to the full curriculum, including the National Curriculum, exists for children with special needs is a contributory factor to the progress they make." Richmond, *supra* note 84, at 60.

87. *Id.*

88. *Id.*

89. See *Disapplication of the National Curriculum*, *supra* note 86.

regardless of race, ability, socioeconomic status, or language proficiency, participate in the mandated assessments. There are positive and negative aspects of both approaches. Should students with disabilities be “excused” from taking assessment tests, or should they be forced to take them and perform as well as their nondisabled peers? For those children with a statement, any alternative arrangements will normally be written into the statement.⁹⁰

Like American special education policies, English policies tout a policy of inclusion.⁹¹ However, despite the entrenchment of “inclusion” in English educational policies, the government has passed legislation that allows students with SEN to disapply from the National Curriculum.⁹² In other words, disapplication permits disabled students to opt out of assessments or activities that may not be appropriate to their needs.⁹³ The National Curriculum permits disapplication in a variety of settings and situations, as stated succinctly in the Education Act of 1996:

Under the National Curriculum, disapplication and modification of the assessments is permitted in specific ways: 1) By a Statement of Special Educational Needs: Sections 362 to 367 of the Act provides that a statement may modify or disapply any or all of the requirements of the National Curriculum if they are inappropriate for the individual child concerned. 2) By Head teachers: Under Sections 362 to 367 of the Act, Head teachers may issue directions so that the National Curriculum may be modified or disappplied by an individual child for a period of up to six months with the possibility of a three month extension. 3) By the Secretary of State for Education: Under Sections 362 to 367 of the Act the Secretary of State is allowed to modify or disapply parts of the National Curriculum in specified cases or circumstances.⁹⁴

90. *Id.*

91. Footnote DES 1985, OFSTED 1999, OFSTED 2000b, Circular 10/99, *reprinted in* Richmond, *supra* note 84, at 57.

92. To disapply students from the National Curriculum, in essence, means that students are not required to take any of the grade level tests that are published in the league tables. *See generally* National Curriculum, *supra* note 77. Disapplication can result from a number of circumstances, ranging from extenuating circumstances such as a death in the family, to a disability. *Id.* However, the National Curriculum assessments have been designed to make sure that as many children as possible can be assessed. *Id.*

93. Disapplication of the National Curriculum, *supra* note 86.

94. Bournemouth Online, The National Curriculum And Special Educational Needs (2004), *available at* http://www.bournemouth.gov.uk/Education/SEN/SEN_The_National_Curriculum.asp (last visited Apr. 8, 2006).

These provisions provide English educators and policymakers with far more flexibility with respect to assessments than American special education laws and policy provide; NCLB has no provision that exempts educators from its strict mandate, even in unusual circumstances.

The significant provision that marks the convergence of special education and accountability policies is section 364 of the Education Act of 1996, which states: “[t]he special educational provision for any pupil specified in a statement under section 324 of his special educational needs may include provision—(a) excluding the application of the National Curriculum, or (b) applying the National Curriculum with such modifications as may be specified in the statement.”⁹⁵ Thus, educators and policymakers in England have the necessary flexibility to determine the best course of action for a SEN student on a case-by-case basis. The choices include either providing needed modifications so that the student can participate in the assessment, or disapplying the student altogether.

The English policy also gives parents recourse if they do not like the decision of the school regarding their disabled child’s participation in these assessments. Parents can appeal to the governing body against a decision to disapply. They can also ask the head teacher for a disapplication and if this is turned down, they can appeal against that decision. And if the governing body turns down their appeal, they can complain to the Local Education Association (LEA).⁹⁶

Thus, in England and the National Curriculum, tests might be modified or disapplied altogether, in accordance with certain legal procedures covering modification or disapplication of the National Curriculum. For those without a statement, the head teacher⁹⁷ may decide to disapply aspects of the National Curriculum, which include assessment tests, because the pupil is undergoing a statutory assessment or because circumstances make it impossible for the pupil to take the tests.

D. High Stakes Testing in England

Like the tests mandated by NCLB, the results from the National Curriculum tests are public information.⁹⁸ In England, schools compete to

95. Education Act 1996, c. 56, § 364.

96. *See supra* note 60.

97. While some head teachers or headmasters still retain some teaching responsibility, most of their duties are managerial; they are comparable to principals in the United States.

98. Michael Resnick, *How To Present NCLB Results to the Media and Public: A Communication Plan for the No Child Left Behind Act*, NAT’L SCH. BD. ASS’N (Summer 2003), <http://www.nsba.org/site/docs/31600/31560.pdf> (last visited Apr. 8, 2006).

have the highest test scores. The results are organized in published League Tables with test scores from different schools.⁹⁹ These league tables create a marketplace environment among the different districts and each school competes and tries to attract the brightest students. Unlike parents in the United States, English parents can often move their children from one school to another, as long as the children meet application guidelines for the particular school. This creates incentives within the English educational system in a way that is different from the American system, where either children attend their local school or their parents pay for them to attend private school.

The publication of these scores is designed to spur accountability in schools.¹⁰⁰ However, unlike NCLB, English high stakes tests do not appear to have the same sort of grave consequences as their American counterparts.¹⁰¹ Most of the pressures are symbolic rather than substantive. Yet, there is still enormous pressure on educators and LEAs. The difference between these tables and the newspaper reports that detail the list of failing schools in the United States is that the tables in England are believed to affect school enrollment numbers.¹⁰² The idea of the “neighborhood school” does not really exist in England, where parents and students can choose the student’s school. Head teachers believe that test scores influence who comes to their schools.¹⁰³

Perhaps the test with the highest stakes in England is the General Certificate of Secondary Education (GCSE), which is essentially equivalent to graduating from high school in the United States. However, unlike American schools, even if English schools do not meet certain standards, they are not sanctioned or publicly shamed with the label of “failing.”¹⁰⁴ Instead, English schools focus on trying to compete in a sort

99. Some English educators condemn these league tables, asserting that they are unscientific and statistically inaccurate and should not be having an impact on parental perceptions of schools to such a great extent. See Gregory & Clarke, *supra* note 78, at 68.

100. Both the Key Stage Two tests—taken by ten and eleven year olds—Key Stage Three tests—taken by thirteen and fourteen year olds—have gained great prominence in England:

They are now published separately as performance tables for secondary schools, but also children may need good results in them if they are seeking to move school to do A-levels. Because they apply before they have taken their GCSE and GNVQ exams, the national curriculum test results are the best evidence they have of their performance.

The School Test Season is Here, BBC NEWS WORLD EDITION, May 4, 2004, available at http://news.bbc.co.uk/2/hi/uk_news/education/3674989.stm (last visited Apr. 8, 2006).

101. *Id.*

102. See Gregory & Clarke, *supra* note 78, at 68.

103. *Id.*

104. *Id.*

of market environment.¹⁰⁵ Schools take actions, such as offering a foreign language not available at other schools in the city, developing a strong performing arts program, strengthening links to feeder primary schools to get head teacher endorsement of their programs when parents choose secondary schools, and publicizing special events and actively courting good publicity.¹⁰⁶ More of these actions are taken in schools that have students from lower socioeconomic levels.¹⁰⁷ Thus, while stakes appear to be high in England, especially for schools serving lower socioeconomic students, much of the response to these sanctions takes the form of marketing—a response that is more symbolic than substantive.¹⁰⁸

On the other hand, students with disabilities may suffer as a result of these league tables:

There is some evidence that schools attempt to control their student intake, selecting the more able students ahead of those with learning difficulties in order to raise or maintain test scores. This has a tendency to “reinforce local schooling hierarchies and increase differences in the mean pupils’ academic attainment between schools.” Because local schools are now in competition for the more able students, mutually beneficial cooperation between schools is diminished, wasteful duplication is increased, and the speed of dissemination of best practice is slowed.¹⁰⁹

Thus, schools may choose not to admit students with disabilities in order to score higher in their league table results. Because there is a great deal of choice available to both parents and schools in the English system, disabled students could potentially fall through the cracks in the competitive, market-type environment.

105. See Amy M. Steketee, Note, *For Profit Education Service Providers in Primary and Secondary Schooling: The Drive For and Consequences of Global Expansion*, 11 IND. J. GLOBAL LEGAL STUD. 171 (2004).

106. See Gregory & Clarke, *supra* note 78, at 68.

107. *Id.*

108. Clearly this response is superior to what occurs in the United States, where schools are sanctioned for underperforming. It is somewhat unfair, however, to compare the American and English systems in this regard. The English school system is privatized in a way that the American system is not. Additionally, choice is an option in England, whereas it is not in most American states (with the exception of those states that have voucher programs). Additionally, the European response to children with special education needs has been quite different from the U.S. response. Namely, Europe has strived to a greater extent to respect the rights of these students. See Jonathan L. Black-Branch, *Equality, Non-Discrimination and the Right to Special Education: From International Law to the Human Rights Act*, EUR. HUM. RTS. L. REP. 2000, 3, 297–314.

109. Gregory & Clarke, *supra* note 78, at 1.

E. Unique English Responses to Educational Disparities

Education experts have been critical of the National Curriculum.¹¹⁰ As a response to these criticisms, the Labour government has launched policies designed to address some of the inequities inherent in English education. First, Education Action Zones (EAZs) were introduced. These zones are in deprived areas and run by individuals who want to make that area's schools better. They were designed to test-run new ideas for transforming the condition of educational underperformance and economically disadvantaged schools.¹¹¹ EAZs are exempted from strict adherence to the National Curriculum and from national pay scales for their staff.¹¹² Thus, EAZs allow for greater flexibility for educators and policymakers.

Additionally, England has taken advantage of this market for education by creating public-private partnerships in the form of "city academies":

110. There has been much criticism about the National Curriculum in England, even from renowned scholars and teachers. Ironically, proponents of these "accountability" policies in public education often send their children to private schools, completely giving up on public school education. "If the National Curriculum was about raising national standards the results so far have not impressed the very groups in whose image the Curriculum was designed. If, however, it was also about reconstituting social hierarchies and differentiation it has clearly been a sweeping success." GOODSON, *supra* note 73, at 203. Additionally, critics attack the National Curriculum assessments as exacerbating a national preoccupation with raising standards, while not addressing deep-seated social and educational inequalities in our society. *Id.*

111. Zone schools have flexibility with regard to the National Curriculum assessments. Zones can design "effective strategies for less academically able pupils, strategies to stretch those of average ability, and strategies to cater imaginatively for gifted and talented children. This could include disapplication of parts of the curriculum in some cases." Dep't for Educ. and Skills, the Standards Site, FAQs, <http://www.standards.dfes.gov.uk/eaz/tools/faq/#861191> (last visited on Apr. 8, 2006); *see also Education Action Zones Achievement Through Partnerships: The Experience of Education Action Zones—Three Case Studies*, http://www.standards.dfes.gov.uk/eaz/news_and_events/other_publications/758913/Introduction.pdf (last visited Apr. 8, 2006). Thus, EAZs can exempt themselves from the National Curriculum, an option that low-performing schools in the United States do not have.

112. Peter Mittler, *Equal Opportunities—for whom?*, in SPECIAL EDUCATIONAL PROVISION IN THE CONTEXT OF INCLUSION: POLICY AND PRACTICE IN SCHOOLS 42 (Janice Wearmouth ed., 2001).

For the United States, these EAZs could serve as a paradigm for educational reform:

Statutory EAZs . . . were established in the School Standards and Framework Act 1998 with the objective of raising standards in schools within zones. A total of 73 statutory zones were setup made up of over 1300 schools throughout the country By 2005 all statutory zones will have transformed into either an Excellence Cluster or an EiC Action Zone. There are currently 47 statutory zones in operation.

Dep't for Educ. and Skills, the Standards Site, Zones Explained, http://www.standards.dfes.gov.uk/eaz/zones_explained/large_zones (last visited Apr. 8, 2006).

Unlike the U.S. federal government, which is often deemed powerless in terms of allocating funding to public schools, the English government has an advantage of being able to exercise more control over the breakdown of its educational system on a nationwide level. This allows the English government to focus its energies on the areas that are in need of the most assistance.

“publicly funded independent schools that can replace decrepit urban schools with state-of-the-art facilities. Comparable to U.S. charter schools, these academies are run by private sponsors with major capital investment from government . . . academies can vary from what is mandated by the [N]ational [C]urriculum.”¹¹³ The English are attempting to lessen the more stringent aspects of the National Curriculum with creative policies to assist low-income areas. Disabled children are best served by policies like these that are established on a case-by-case basis, as opposed to the imposition of rigid standards without an understanding of the consequences.

V. ANALYSIS

Accountability policies in the United States and England have generated a great deal of criticism.¹¹⁴ The Tenth Amendment of the United States Constitution reserves the function of educating to the states.¹¹⁵ This is different from the system in England, where education is controlled locally, as opposed to at a state level.¹¹⁶ Considerable good can come from federal involvement in education. The national governments in both countries are primarily concerned with equality issues in schools, which has spurred involvement.¹¹⁷

113. *Leave No City Behind*, *supra* note 76, at 4.

114. More than fifty Internet sites for organizations opposed to high-stakes testing are listed on the Internet. These groups are fighting the assertion that one-size-fits-all, high-stakes, machine-graded, standardized tests are useful barometers of educational performance.

On the other hand, supporters of NCLB and high stakes testing hold a very different view:

Tests tell us what the problem is. US [sic] students perform comparably to their international peers in the early grades but steadily lose ground as they move up in age and grade . . . All stakeholders in the effectiveness of American schooling—from parents who seek the best for their children, to the local, state, and federal legislators who set the education policy that affects school performance—deserve to know if our schools are passing the test.

Bill Evers & Herbert J. Walberg, *Why not put Schools to the Test?*, CSMONITOR.COM, July 12, 2004, <http://www.csmonitor.com/2004/0712/p09s02-coop.html> (last visited Apr. 8, 2006).

115. U.S. CONST. amend. X. In its decision in *Milliken v. Bradley*, the Supreme Court held, “No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to the quality of the educational process.” 418 U.S. 717, 741–42 (1974) (internal citations omitted).

116. See Michael J. Martin, *Lessons Learned: An Evaluation of the Past and Future of Educational Finance and Administrative Reform in Canada, Great Britain, and the United States*, 31 GEO. WASH. J. INT’L L. & ECON. 271, 277–82 (1998).

117. National involvement in England and the United States has stemmed from a desire to promote equality. “Both British and U.S. educational systems originally operated on a strictly local level and discriminated against student groups. The two countries’ national governments interceded to prevent racial discrimination in the United States and class discrimination in England. This national involvement has only continued to increase.” Jaime S. Boutwell, *A Case of Unconstitutional Immigration: The Importation of England’s National Curriculum to the United States*, 34 VAND. J.

NCLB specifies schools' responsibilities for including special education students in their overall assessment programs.¹¹⁸ These students must be assessed under a standardized test that is used for all students within a district, a test designed to show whether a student is meeting that state's standards for learning. Schools nationwide are now struggling¹¹⁹ to meet the requirements of NCLB for special education students without excluding them from realistic assessments or negatively impacting their educational progression.

The IDEA fails to delineate how states should include children with disabilities in their accountability systems. This is a significant flaw in the policy. After the passage of NCLB in 2001,¹²⁰ state departments of education and local education authorities were unsure of how to proceed with respect to special education students.¹²¹ Teachers disagree as to how to best incorporate students with disabilities into this new rubric of educational accountability.¹²²

America stands apart from the rest of the world in that there is no overarching American curriculum.¹²³ Most countries have national curriculums monitored by national ministries of education.¹²⁴ In the United States, even though there is federal legislation that concerns

TRANSNAT'L L. 333, 333-45 (2001).

This raises an interesting question about what role the national government should play in education. Arguably, after the decision in *Brown v. Board of Education of Topeka*, the federal government has played a substantial role in shaping educational policy. See *Brown v. Bd. of Educ. of Topeka*, 349 U.S. 294 (1955). The question then becomes to what extent is federal involvement constitutional. This question is beyond the scope of this Note but remains a fascinating subject area.

118. See *supra* text accompanying notes 35-38.

119. See HEUBERT & HAUSER, *supra* note 58

120. See *supra* text accompanying 60-65.

121. See HEUBERT & HAUSER, *supra* note 58.

122. There is ambivalence among educators about how students with disabilities should participate in national assessments:

According to a poll commissioned by *Education Week* for *Quality Counts 2004*, teachers agree, in principle, that students with disabilities should be held to high standards. But more than 85 percent of the teachers polled think it is unfair for special education students or teachers to be evaluated on how well special education students master academic-content standards based on test scores. Seventy-eight percent of the teachers believe requiring special education students to meet state academic-content standards and take state tests will hinder their individualized education. And 84 percent think special education students should not be expected to meet the same set of academic-content standards as general education students their age.

Quality Counts 2004: Count Me In, Special Education Standards in an Era of Standards, EDUC. WK., <http://counts.edweek.org/sreports/qc04/> (last visited Apr. 8, 2006).

123. FENWICK W. ENGLISH & BETTY E. STEFFY, *DEEP CURRICULUM ALIGNMENT 29* (Rowman 2001).

124. Many other countries have set curriculums that are designed by the national government. This is not the case in the United States.

education, there is no approved curriculum that exists in all fifty states.¹²⁵ Arguably, Americans want the benefits of a centralized curriculum without imposing any restrictions.¹²⁶

England has chosen to allow students with disabilities to disapply from the National Curriculum. Adopting this policy could lead to major problems in the United States. Students with disabilities could be forced to abstain from taking the high stakes tests under NCLB.¹²⁷ School districts, under an immense amount of pressure to avoid being labeled as “failing,” might abuse their power over students and force their abstention.

Parents of students with disabilities have already complained that this occurs. For example, the parent of a child with Down’s syndrome complained, “[a]lthough my son is included, he is still in special education. The bottom line is that the school people don’t want ‘those kids’ to take standardized tests. We had a real fight to get them to test him.”¹²⁸

Another major problem with the NCLB is how the rewards and sanctions are having an impact on students receiving special education. According to *State Accountability for All Students*, a joint research effort funded by the United States Department of Education, Office of Special Education Programs, and supported by the University of Dayton and the School Study Council of Ohio, “[s]tates with graduation tests placed 50% more students outside the regular classroom more than 60% of the

125. Additionally, the American government does not fund education to the extent that the English government does. In England, “the national government bears more than 80 percent of the costs for publicly financed precollegiate education, with per-pupil expenditures typically higher in the more disadvantaged areas.” Lynn Olson, *The United Kingdom: An Educator’s Guide*, EDUC. WK., May 5, 2004, <http://www.counts.ed.week.org/sreports/qc04/> (search Archives, “Olson” between dates April 2004 and June 2004, result on second page) (subscription service required) (last visited Apr. 8, 2006).

126. The examinations in England are very closely related to a curriculum that is taught throughout the country. In the United States, the NCLB assessments are the same throughout the country, yet there is no national curriculum because of the decentralized nature of the American educational system. This arguably allows educators more flexibility and greater creativity in their teaching and curriculum planning. However, this decentralized system generates a tension with high stakes testing, because the tests are not aligned with a national curriculum:

The best form of assessment occurs when it is deeply aligned with the curriculum . . . This condition applies in England and Wales, where each year’s national test is made public, but not in the states. In an open atmosphere, testing contents have been demystified. Practice tests are publicly available on the Internet and in forms for parents to read and understand.

ENGLISH & STEFFY, *supra* note 123, at 118. See also *supra* note 60.

127. See *supra* notes 25–41 and accompanying text.

128. Peter W. D. Wright & Pamela Darr Wright, Why Children with Disabilities Should Take High Stakes Test: One Parent’s View, <http://www.wrightslaw.com/info/highstak.down.success.htm> (last visited Apr. 8, 2006).

time.”¹²⁹ These statistics clearly raise questions as to whether this system of rewards and sanctions is hurting students with disabilities. If disabled students are being placed out of regular classrooms and stigmatized, then the NCLB is not preventing them from being “left behind.”

There seems to be a significant flaw in the NCLB in that it punishes the schools that need the most assistance by labeling them as “failing schools” and then imposing sanctions upon them. It is completely counterintuitive and counterproductive to publicly rebuke schools that are not meeting the ridiculously high AYP standard by withdrawing funds. England, on the other hand, has instituted Education Action Zones to respond to schools that are clearly in crisis or are in danger of what U.S. policy would label as “failing.”¹³⁰ Disabled students could bear the brunt of the failure of school districts and schools to meet AYP by being further stigmatized. It is difficult to believe that such a result is good for either special education or school-improvement efforts.

NCLB was motivated by a widely shared desire to improve the education of America’s youth.¹³¹ Consistent with legislation adopted in many states, the NCLB relies on assessments and accountability requirements as a major mechanism for bringing about desired improvements in student achievement. However, the requirement that progress be made for subgroups of students defined by race, ethnicity, and economic background, goes beyond what is required in most states and in England as well. There is no provision in English educational policy that specifically addresses the needs of these subgroups. It is debatable whether identifying target groups is the best way to serve these populations. A point can be made that NCLB emphasizes differences, and thus creates a disconnect, consciously or unconsciously, with our desire to create an accepting, nurturing, democratic culture.¹³² Does democracy in education necessitate categorizing students in this way? While it could empower, segmentation may further stigmatize and segregate those most in danger of being left behind.

The very thesis of the NCLB is that all students must reach a given level of learning in reading and math as measured by a standardized test.

129. State Accountability for All Students, *Issue Brief: High Stakes Policies and Students With Disabilities*, http://www.isbe.state.il.us/spec-ed/pdfs/lre_high_stakes.pdf (last visited Apr. 8, 2006).

130. See *supra* note 45.

131. *Id.* See also Drew Allbritten, Richard Mainzer & Deborah Ziegler, *Will Students with Disabilities Be Scapegoats for School Failures?* 82 EDUC. HORIZONS 153 (Winter 2004), available at <http://www.pilambda.org/horizons/v82-2/Allbritten-Mainzer-Ziegler.pdf> (last visited Apr. 8, 2006).

132. See Perry A. Zirkel, *NCLB: What does it Mean For Students With Disabilities?*, 185 EDUC. L. REP. 805 (2004).

This is antithetical to the thesis of special education, which proscribes that the goals of students with disabilities must be individualized according to each student's unique needs.¹³³ NCLB virtually guarantees that the presence of special education students in a school will contribute to the school's failure to make AYP.¹³⁴ That danger, combined with the additional cost of implementing the one percent cap¹³⁵ and the "students with the most significant cognitive disabilities"¹³⁶ designation, could increase the already existing anti-special education bias. Because improved federal policies have not changed attitudes at the state and local levels, special educators remain concerned that the alternate assessment cap, based on alternative achievement standards, may become a way to avoid appropriate AYP accountability. As long as providing services to special education students is perceived as a burden, school-level AYP for students with disabilities is likely to be a "damned if you do, damned if you don't proposition."¹³⁷

Schools that do not meet AYP targets two years in a row can be sanctioned. One of the sanctions is that special education students in an underperforming school can transfer to a higher performing school within their district. A number of issues arise with this portion of the NCLB legislation. While no school has been sanctioned to date, the school choice option could end up "scapegoating" the special needs student. For example, if one elementary school in a district has not met AYP for special education, there could be "dumping" of lowest achieving special education students to a higher-achieving school.¹³⁸ The NCLB adds significant obligations to the already complex regulations covering special education. Schools already constrained by limited resources in addressing the needs of students with disabilities will have to develop innovative strategies to meet the conflicting mandates of the NCLB, IDEA, and section 504. Only when we see these differences resolved will we be able

133. See Allbritten, Mainzer & Ziegler, *supra* note 131.

134. Angela Sorrentino & Perry A. Zirkel, *Is NCLB Leaving Special Education Students Behind?*, <http://www.naesp.org> (Search "Sorrentino") (last visited Apr. 8, 2006).

135. NCLB regulations limit the number of students in each LEA who can be counted as proficient using alternative achievement standards to 1.0 percent of the LEA's enrollment in each testing grade in English language arts (ELA) and mathematics. See *supra* note 30 and accompanying text.

136. See generally DEP'T OF EDUC., ALTERNATE ACHIEVEMENT STANDARDS FOR STUDENTS WITH THE MOST SIGNIFICANT COGNITIVE DISABILITIES 2005, available at <http://www.ed.gov/policy/elsec/guid/altguidance.pdf> (last visited Apr. 4, 2006).

137. See generally DO NOT HARM, *supra* note 48.

138. *Id.*

to assess whether the NCLB has been helpful or harmful to meeting the educational needs of students with disabilities.

CONCLUSION

In response to an increasingly competitive global economy, the United States has instituted accountability policies to improve its educational system. However, the NCLB policy is a faulty response. Critics label NCLB an “unfunded mandate,” a policy that imposes standards without the hope of financial assistance and creates financial penalties.¹³⁹ This is especially noteworthy in the area of special education. Unlike many other countries, the United States does not have a federally mandated national curriculum. Instead, the United States imposes restrictions with no set guidelines. The individuals who are most hurt by flaws in this policy are children with disabilities.

Test results are a limited measure of what children know, understand, and can do.¹⁴⁰ Such examinations can take many forms and teachers in individual schools can even create them. Unfortunately, testing can be misused, and there are insufficient alternatives and modifications for special education students. The area of public policy in which NCLB and special education legislation intersect remains largely undefined. Until policymakers or the courts define exactly where one policy ends and the other begins, school districts will be left with little guidance as to how to correctly implement both special education legislation and the potentially conflicting mandates of the NCLB. Currently, the legal and political landscape is convoluted, and until more concrete modifications and alternatives are available for disabled children, they will continue to be left behind. Children with disabilities need the special protections of legislation created to protect them.

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139. See *supra* notes 34–35, 55–58 and accompanying text.

140. See Richmond, *supra* note 84.

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